Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States

Jenny Burnett,

Petitioner,

v.

Tyco Corporation, Grinnell Corporation.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether sexual harassment must be both severe and pervasive, or whether either is sufficient, to meet the objective element of a sexually hostile environment under Title VII, 42 U.S.C. 2000 (e) et seq.

PARTIES TO THE PROCEEDING

Petitioner is Jenny Burnett.

Respondents are Tyco Corporation and its subsidiary, Grinnell Corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Writ	2
I. The Decision Of the Court of Appeals Conflicts With Decisions Of The Supreme Court And With Prior Decisions Of The Sixth Circuit	2
II. The Decision Of The Court of Appeals Conflicts With Prior Decisions Of The Sixth Circuit	3
Conclusion	4

TABLE OF CITED AUTHORITIES

Page

Harris v. Forklift Systems, 510 U.S. 17, 21 (1993) . . 2, 3

Mendoza v. Borden, Inc., 158 F.3d 1171 (11th Cir. 1998) 4

Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) 2, 3

Williams v. General Motors Corp., 187 F.3d 553 (6th Cir. 1999) 2, 3, 4

TABLE OF APPENDICES

Page

Appendix A – Opinion Of The United States Court Of Appeals For The Sixth Circuit Dated And Filed February 11, 2000 ..... 1a

Appendix B – Judgment Of The United States Court Of Appeals For The Sixth Circuit Denying A Timely Petition For Rehearing En Banc Dated And Filed March 24, 2000 .. .. 2a

Appendix C – Order Of The United States District Court For The Western District Of Tennessee, Eastern Division, Granting Defendant Tyco's Motion For Summary Judgment 3a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. A) is reported at Burnett v. Tyco, Inc., 2000 FED App. 0051P (6th Cir. 2000).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered February 11, 2000. The Court of Appeals entered an order denying a timely petition for rehearing en banc on March 24, 2000. (App. B)

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Title VII of the Civil Rights Act, 42 U.S.C. 2000(e) et sea.

STATEMENT OF THE CASE

Jenny Burnett has worked at Tyco, Inc., in its Jackson, Tennessee subsidiary (known as Grinnell") for approximately twenty years. In a six month period of 1994, Tyco's personnel manager reached inside her blouse and inserted a cigarette case inside the upper portion of her brassiere strap. He also told her that a cherry cough drop

could replace the "cherry she lost," and said that her Christmas sweatshirt (reading "Deck the Malls") said "*Dick* the Malls," and that it was making him "horny." Other females, too, complained in writing about the same personnel manager's consistently filthy and inappropriate language toward women.

The United States District Court for the Western District of Tennessee (Todd, J.) and a divided panel of the United States Court of Appeals for the Sixth Circuit determined that the above actions, even taken in the light most favorable to the Plaintiff on a summary judgment, could not meet the objective standard for a sexually hostile environment under Title VII. Summary judgment was entered for the Defendant, and affirmed on appeal, even though the Sixth Circuit found the inappropriate touching "perhaps even constitutes a battery."

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH PRIOR DECISIONS OF THE SIXTH CIRCUIT.

The Sixth Circuit Court of Appeals' panel decision conflicts with decisions of the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986); *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993); *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999).

In both *Meritor* and *Harris*, the United States Supreme Court found harassment actionable if it is either severe or pervasive. There is no requirement that it be both. *Harris*, at 21; *Meritor*, at 67. The Sixth Circuit majority's opinion in the present case recognizes that placing a cigarette case inside a woman's blouse and brassier strap is actually more severe than the facts in prior Sixth Circuit decisions. Indeed, the majority states that it "perhaps even constitutes a battery."

Because both severity and pervasiveness are not required to state a claim under Title VII, the Supreme Court should accept this writ. Preserving the Supreme Court's either/or approach to preventing and remedying sexual harassment is important. Otherwise, following this decision, employers may adopt a "one free battery" or "one free touching" rule to guide sexual harassment decisions.

II.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THE SIXTH CIRCUIT

The Sixth Circuit's panel decision also conflicts with its prior decision in *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999). In *Williams*, the Sixth Circuit held that the acts allegedly constituting sexual harassment must be given their "cumulative effect." Id. at 561.

The district court, and majority decision by the Court of Appeals, however, analyzed the events one at a time,

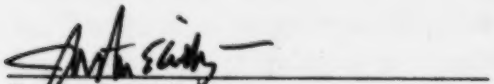
concluding that only one of the three was "severe." Per *Williams*, as the dissenting opinion points out, this teasing out and separate scoring of each event "divorc[es] them from their context and depriv[es] them of their full force." Had the events been analyzed cumulatively – an unwanted battery coupled with an unwanted comment about the female's hymen and an unwanted comment about the man's arousal from the female's Christmas sweater – the aggregate effect would, at least, create a genuine issue of material fact. See also, *Mendoza v. Borden, Inc.*, 158 F.3d 1171 (11th Cir. 1998) (hostile environment is single cause of action, not the sum total of a number of causes examined in a vacuum).

Because the severity element is present, particularly considering the aggregation instead of disaggregation of events, the District Court and Court of Appeals' decisions should be REVERSED and remanded for trial.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,



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Appendix A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED FEBRUARY 11, 2000

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Jenny Burnett,

Plaintiff-Appellant,

v. No. 98-6477

Tyco Corporation and Grinnell Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Tennessee at Jackson.
No. 96-01132--James D. Todd, District Judge.

Argued: October 27, 1999

Decided and Filed: February 11, 2000

Before: MARTIN, Chief Judge; SUHRHEINRICH and SILER, Circuit Judges.

COUNSEL

ARGUED: Justin S. Gilbert, THE GILBERT FIRM, Jackson, Tennessee, for Appellant. Michael G. McLaren, Memphis, Tennessee, for Appellees. ON BRIEF: Justin S. Gilbert, THE GILBERT FIRM, Jackson, Tennessee, for Appellant. Michael G. McLaren, Memphis, Tennessee, Cheryl Rumage Estes,

THOMASON, HENDRIX, HARVEY, JOHNSON & MITCHELL, Memphis,
Tennessee, for Appellees.

SILER, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined.
MARTIN, C. J. (pp. 10-12), delivered a separate dissenting opinion.

OPINION

SILER, Circuit Judge. Plaintiff Jenny Burnett sued defendants Tyco Corporation and Grinnell Corporation ("Grinnell") under Title VII, 42 U.S.C. § 2000e et seq., alleging that certain sexual statements and other conduct were sufficiently severe or pervasive to constitute a hostile working environment. The district court granted summary judgment to defendants. We affirm the grant of summary judgment because the allegations do not create a genuine issue of material fact as to whether the conduct was sufficiently severe or pervasive to support a finding of a hostile working environment.

I. BACKGROUND

Burnett was an employee of Grinnell(1) for over nineteen years, during which time she alleges that she was sexually harassed. Burnett points to three specific instances in which Jim Phillips, personnel manager for Grinnell, engaged in offensive conduct. Burnett also submits complaints from other female Grinnell employees indicating that they have been offended by Phillips's inappropriate behavior.

The first instance of alleged harassment occurred sometime in July 1994 at a meeting of Grinnell's packing department. Burnett stated that Phillips entered the room and began telling a story about a woman he had recently seen. While telling this story, he allegedly placed a pack of cigarettes containing a lighter inside Burnett's tank top and brassiere strap. Burnett stated that she was stunned, shocked, and exposed. However, she also testified that Phillips pulled the strap up just enough to insert the cigarette pack and that the resulting exposure was no greater than it would have been had she merely leaned over while wearing the tank top.

The second alleged incident occurred some two weeks later at another departmental meeting. On this occasion, Burnett was coughing and Phillips allegedly gave her a cough drop while stating, "Since you have lost your cherry, here's one to replace the one you lost."

The third incident allegedly occurred on December 29, 1994. Burnett was wearing a Christmas sweater that read "Deck the Malls." As Phillips walked by Burnett, he allegedly stated to her "Dick the malls, dick the malls, I almost got aroused."

Finally, other allegations of harassing behavior by Phillips are presented in two affidavits of fellow Grinnell employees. In the first affidavit, a fellow female employee stated that based on her personal knowledge of how women were treated by men at Grinnell she felt like "Grinnell [was] more like a whorehouse than a plant." Additionally, a second affidavit included a form filled out by a female employee that was placed in Grinnell's suggestion box. The suggestion form alleges that "[p]ractically all of the women down here has had a filthy remark from this man - Jim Phillips - including myself." Under Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246 (6th Cir. 1998), "this evidence is

irrelevant at this stage to plaintiff's hostile environment . . . [claim] because there is no evidence that plaintiff was aware of these actions at the time." Id. at 249 n.4. Thus, we will address only the three allegations of Phillips's behavior directed to, and with the knowledge of, Burnett.

Following the third instance of alleged harassment, Burnett filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). Grinnell alleges that it investigated the charges contained in the EEOC complaint, but could not substantiate them. No relief was granted by the EEOC, leading Burnett to institute this action. Grinnell moved for summary judgment, which was granted on the basis that Burnett failed to show that there were material facts in dispute regarding whether the conduct complained of was sufficiently severe or pervasive to create a working environment that a reasonable person would find hostile or abusive.

II. DISCUSSION

A. Standard of Review

This court reviews de novo a district court's grant of summary judgment. See Smith v. Ameritech, 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate only when there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is 'no genuine issue for trial.'" Id. (quoting First National Bank of Ariz. v. Cities Service Co.,

391 U.S. 253, 289 (1968)).

B. Hostile Work Environment.

Title VII of the Civil Rights Act of 1964 prohibits discrimination by an employer "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex[.]" 42 U.S.C. § 2000e-2(a)(1). In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court held "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." Id. at 66. The Court further explained that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." Id. at 67 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)). Finally, Meritor established that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Id. (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

The hostile or abusive environment standard has been both affirmed and elaborated upon by the Court on several occasions. See Faragher v. City of Boca Raton, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753-54, 118 S. Ct. 2257, 2265 (1998); Oncale v. Sundowner Offshore Serv., Inc., --- U.S. ---, 118 S. Ct. 998, 1001 (1998); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). Importantly, in Harris, the Court noted that the Meritor standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." Harris, 510 U.S. at 21. Thus,

Title VII is not "a general civility code for the American workplace." Oncale, --- U.S. at ---, 118 S. Ct. at 1002. "'The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" Id. (quoting Harris, 510 U.S. at 25 (Ginsburg, J., concurring)).

Several circumstances are to be considered in determining whether an environment is "hostile" or "abusive," which "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23. The use of the term "may" reiterates the Court's insistence that this is a non-exhaustive list of possible circumstances to consider. Thus, the issue "can be determined only by looking at all the circumstances." Id.; see also Williams v. General Motors Corp., 187 F.3d 553, 562 (6th Cir. 1999) (stating that "it is well-established that the court must consider the totality of circumstances.")

C. Analysis

Burnett's sole contention is that the district court erred in finding that no genuine issue of material fact exists as to whether there was an objectively hostile work environment at Grinnell. Grinnell responds that Burnett has not shown that Phillips's conduct was sufficiently severe or pervasive to create an objectively hostile work environment and that there has been no showing that a condition of Burnett's work environment has been affected. The three most recent hostile environment cases emanating from this Circuit show that there is no genuine issue of material fact in this matter.

In Black v. Zaring Homes, Inc., 104 F.3d 822 (6th Cir.),

cert. denied, 118 S. Ct. 172 (1997), this court reversed a jury verdict which found that Black was subjected to a hostile work environment while she was an employee of Zaring Homes. Black alleged that she was subjected to various discriminatory comments made at bi-weekly meetings from July to October in 1993. First, at a July meeting, as a manager reached for a pastry he stated, "Nothing I like more in the morning than sticky buns." Id. at 823. The manager allegedly looked at Black in a suggestive manner while making this comment. See id. At the next meeting in August, participants joked that a parcel of land located next to a Hooters Restaurant should be named "Hootersville," "Titsville," or "Twin Peaks." These jokes allegedly continued at several of the bi-weekly meetings. See id.

Also in August, while discussing her job performance and bonus structure with her immediate supervisor, Black was told that she "was paid great money for a woman." Id. at 824. At a September meeting, Black allegedly felt uncomfortable when jokes were made about her pronunciation of the name "Busam," which was apparently pronounced "bosom." See id. Finally, at two meetings in October, Black was asked by the president of the defendant corporation, "Say, weren't you there [at a biker bar] Saturday night dancing on the tables," and was referred to as a "broad." See id.

Although these alleged incidents took place fairly consistently over a period of four months, this court held that defendant was entitled to judgment as a matter of law under the Harris test because under the totality of the circumstances the comments were merely offensive and were therefore insufficient to support the jury's verdict. See id. at 826. The court deemed important the fact that "most of the comments were not directed at plaintiff[.]" Id. Unlike the regularly occurring conduct in Black, Burnett here alleges that the acts giving rise to a hostile work environment occurred at the

beginning and at the end of a six month period. Thus, the allegations in the instant appeal are less pervasive than those in Black. Additionally, the two comments alleged to have been made by Phillips were no more severe than the statements made in Black. The fact that the statements were directed at Burnett neither removes their innocuous nature under Title VII nor cures their infrequency.

Burnett principally relies upon Abeita, in which a panel of this court reversed a summary judgment granted to TransAmerica on a hostile environment claim. In Abeita, the plaintiff alleged discriminatory conduct in the form of several offensive comments made over a period of seven years. Only one of the statements was specifically directed at plaintiff Abeita. The statement was made by the president of TransAmerica who asked Abeita, "oh yellow dress and yellow shoes, yellow underwear too?" Abeita, 159 F.3d at 248. The other alleged incidents concerned the president's sexual interest in other women, including a model he hired for a photo session in order to meet her, and various other comments that "were not sexual in nature but arguably reflect degrading gender stereotyping." Id. The district court granted summary judgment to TransAmerica, holding that the several offensive comments over a period of seven years did not present any evidence stronger than that addressed in Black. See id. at 252.

This court reversed, holding that the "District Court's analysis omits the plaintiff's claim that Katz's sexual comments were 'commonplace,' 'ongoing,' and 'continuing.' This omission is critical because . . . [the statements] appear to be of approximately equal severity to those found in Black." Id. at 252. In the instant case, Burnett does not allege that Phillips's conduct was commonplace, ongoing, or continuing. Indeed, three alleged instances spread out at the beginning and at the end of a six-month period are not

commonplace, ongoing, or continuing, and are therefore less pervasive than the discriminatory conduct in Abeita.

The severity of the incidents is most properly evaluated in light of the recent Williams decision. In Williams, there were fifteen separate allegations of sexual harassment over a period of one year that were alleged to have created a hostile working environment. The allegations included derogatory and profane remarks directed at the plaintiff, sexually explicit comments directed at plaintiff, offensive comments directed at women in general, denial of plaintiff's overtime, and the exclusion of plaintiff from certain workplace areas. See Williams, 187 F.2d at 559. The district court granted summary judgment to General Motors on the grounds that the alleged incidents, though offensive, were not severe or pervasive enough to constitute a hostile work environment. See id. at 560.

This court reversed, holding that the district court failed to evaluate the allegations by considering the totality of the circumstances and erred by concluding that alleged conduct must be explicitly sexual in order to have created a hostile work environment. See id. at 561-62. The latter portion of this holding is immaterial to this appeal because all the conduct at issue was sexual in nature. The most relevant circumstance noted in Williams was that three of the alleged incidents "were not merely crude, offensive, and humiliating, but also contained an element of physical invasion." Id. at 563. This court held that "Williams's allegations, taken as a whole, raise a question whether Williams was subjected to more than 'genuine but innocuous differences in the ways men and women routinely interact,' and therefore summary judgment was inappropriate." Id. at 564 (citation omitted).

The Harris standard requires that the conduct be sufficiently severe or pervasive to alter the conditions of the

plaintiff's employment and thereby create a hostile or abusive working environment. In the instance case, Burnett's three allegations occurring at the beginning and end of a six-month period are clearly not as pervasive as the fifteen incidents which occurred in Williams over a year-long period, or the various remarks made over the course of seven years in Abeita. Indeed, though it was clearly offensive, Phillips's behavior cannot be said to be even as pervasive as the several remarks made regularly over a four-month period in Black which were insufficient to support the jury's verdict therein. Thus, the occurrence of the three allegations over the six-month period does not give rise to a genuine issue of material fact as to whether the conduct was sufficiently pervasive to create a hostile work environment.

However, the cigarette pack incident was more severe than any of the conduct alleged in Black, Abeita, or even Williams because there was physical contact. Given Williams's emphasis upon an 'element of physical invasion,' this incident is fairly severe and perhaps even constitutes a battery. However, under the totality of the circumstances, a single battery coupled with two merely offensive remarks over a six- month period does not create an issue of material fact as to whether the conduct alleged was sufficiently severe to create a hostile work environment.

AFFIRMED.

DISSENT

BOYCE F. MARTIN, JR., Chief Judge, dissenting. In Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993), the Supreme Court acknowledged that determining whether a

work environment is objectively hostile or abusive is not a "mathematically precise test." Because this imprecise test requires careful consideration of the aggregate effect of the offensive factual incidents endured by Jenny Burnett, rather than simply a tallying of the occurrences, I must respectfully dissent.

In Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), the Court defined hostile work environment sexual harassment: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." In Harris, the Court provided a nonexclusive list of factors for identifying a hostile work environment: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23.

The majority fails to acknowledge the impact of our Court's recent decision in Williams v. General Motors Corporation, 187 F.3d 553 (6th Cir. 1999). In Williams, we reversed the district court's grant of summary judgment in favor of the defendant. The plaintiff alleged multiple acts creating a hostile work environment: foul language, sexual comments directed at plaintiff, at least one incident of physical contact, perceived inequities of treatment, and pranks or annoying conduct by co-workers. See id. at 559, 562. We held the district court erred in its dismissal of these incidents as "'infrequent, not severe, not threatening or humiliating, but merely offensive.'" Id. at 563. We found the district court failed to consider the totality of the circumstances and thereby "robbed the incidents of their cumulative effect." Id. at 561. We noted that a Title VII violation may exist even when no single episode of sexual

harassment would be sufficient to create a hostile environment. See id. at 564. We stressed that the totality of the circumstances approach is the "most basic tenet" of the hostile work environment cause of action. Id. at 564. More specifically, we found that incidents with an "element of physical invasion" were "not merely crude, offensive, and humiliating." Id.

Under Meritor Savings Bank, 477 U.S. at 67, and Harris, 510 U.S. at 21, sexual harassment is actionable under Title VII if the alleged conduct is sufficiently severe or pervasive. It need not be both. Burnett does not base her claim on the pervasive nature of Phillips's conduct, by alleging that Phillips's conduct was ongoing or continual. Rather, she asks this Court to examine whether the aggregate severity of Phillips's conduct was sufficient to create a hostile work environment. The district court and the majority have failed to examine Burnett's evidence of a hostile work environment under the totality of the circumstances approach. Both have broken out the individual incidents and determined that none alone was adequately "severe" to create a hostile work environment. The majority creates a scorecard, finding one act to be severe and two to be innocuous. While I do not fully agree with their conclusions, I object more strongly to their method of computation. The majority concludes that these numbers are insufficient to create an issue of material fact as to whether the conduct was sufficiently severe to create a hostile work environment. In doing so, the majority fails to examine the aggregate effect of the incidents. See Williams, 187 F.3d at 564.

The district court found that Phillips's act of reaching inside Burnett's blouse and placing a cigarette pack under her bra strap was merely inappropriate. The majority properly acknowledges this error and concedes that this physical contact was a battery. The severity of Phillips's act is

enhanced because this was unwelcome physical contact of a very personal form. Reaching inside someone else's clothing, especially someone's undergarments, cannot be considered merely inappropriate. As we noted in Williams, 182 F.3d at 563, this "element of physical invasion" exceeds conduct that is "merely crude, offensive, and humiliating." I cannot overlook the severity of this physical contact.

Furthermore, the district court labeled both of Phillips's comments to Burnett as "mere offensive utterance[s]." Phillips's statement, "Since you have lost your cherry, here's one to replace the one you lost," was more than merely offensive. Unlike most of the comments found to be of inadequate severity in Black and Abeita, this comment was made directly to Burnett. As well, the comment was an explicit reference to a private body part, her hymen. I cannot agree with the majority's dismissal of this comment as innocuous. Such a blatantly sexual comment addressed directly to Burnett by her supervisor in the presence of other employees exceeded the excusable realm of crude and adolescent behavior.

Although the number of incidents alleged by Burnett-she presents three incidents of inappropriate conduct-is less than those alleged in Black, Abeita, or Williams, this should not be determinative. When viewed under the totality of the circumstances approach, the severe nature of these incidents distinguishes the present case. At a minimum, these facts create a genuine of issue of material fact as to whether the work environment was objectively hostile. Therefore, I respectfully dissent.

1 Tyco International (US) Inc. is the parent company of Grinnell Corporation. Grinnell, as used herein, refers to both defendants.

Appendix B

JUDGMENT OF THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT
DENYING A TIMELY PETITION FOR REHEARING
EN BANC DATED AND FILED MARCH 24, 2000

98-6477

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JENNY BURNETT,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	FILED
TYCO CORPORATION, ET AL.,	)	MAR 24, 2000
	)	
Defendants-Appellees.	)	
	)	

BEFORE: MARTIN, Chief Judge; SUHRHEINRICH and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Chief Judge Martin would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF
THE COURT

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Appendix C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, EASTERN DIVISION, GRANTING DEFENDANT TYCO'S MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

JENNY BURNETT	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 96-1132
	)	
TYCO CORPORATION,	)	
GRINNELL CORPORATION	)	
and JIM PHILLIPS	)	
	)	
Defendants.	)	

ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING MOTION TO STAY OR FOR VOLUNTARY DISMISSAL, AND CONTINUING TRIAL

Plaintiff Jenny Burnett is an employee of Defendant Grinnell Corporation, a subsidiary of Defendant Tyco Corporation. Plaintiff brings suit under Title VII, 42 U.S.C. § 2000 et seq., alleging that Jim Phillips, Grinnell's personnel or human resource manager, subjected her to sexual harassment sufficient to constitute a hostile environment. Plaintiff also alleges that she was subjected to

quid pro quo sexual harassment and retaliation. Before the court is Defendants' motion for summary judgment on the hostile environment and retaliation claims.[1]

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1 Plaintiff also asserted Title VII claim s against Defendant Phillips individually, and various state law claims against all the Defendants. These claims were dismissed by the court in prior orders entered July 22, 1996, and July 31, 1996. The court also notes that the motion for summary judgment does not appear to be addressed to Plaintiff's claims of quid pro quo sexual harassment.

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must go beyond the pleadings and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Celotex Corp., 477 U.S. at 323.

"If the defendant . . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . .[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be

evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). However, the court's function is not to weight the evidence, judge credibility, or in any way determine the truth of the matter but only to determine whether there is a genuine issue for trial. Id. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is. . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street v. J.C. Bradford & Co., 886 F. 2d 1472, 1479 (6th Cir. 1989) (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

The evidence in the record shows the following relevant facts. Sometime in July, 1994, members of the packing department at Grinnell, including Plaintiff, had gathered for a meeting. Defendant Phillips entered the room,

and during conversation while waiting for the meeting to begin, told a story about a woman he had seen at the fairgrounds. As he was telling the story, Phillips picked up a cigarette case with a lighter in it, reached over and place the case under Plaintiff's top and bra strap, just for a moment. A second incident occurred approximately two weeks later, during another departmental meeting. Plaintiff was coughing, and Phillips handed her a cherry cough drop, saying, "since you have lost your cherry, here is one to replace the one you lost." The last incident complained of occurred on December 29, 1994. Plaintiff was wearing a holiday sweatshirt reading "Deck the Malls." Phillips approached her and said, in the presence of other employees, "dick the mall, dick the mall. That said dick the mall. I almost got aroused."

In addition, for a period of time in 1995, after her EEOC charge had been filed, Plaintiff's supervisor timed and kept track of her bathroom breaks. Plaintiff attempted to set

up a meeting with the plant manager, Peter Baker, about this problem, but Baker would not meet with her or discuss the matter with her. However, no one threatened Plaintiff's job because of the EEOC charge, was insulting, rude or discourteous to her, or accused her of lying or making false accusations. Plaintiff was not demoted, transferred, or formally disciplined in any way.

Defendants argue that they are entitled to judgment as a matter of law on Plaintiff's hostile environment claim because she has failed to demonstrate a genuine issue of material fact regarding whether the alleged harassment was sufficiently severe or pervasive to constitute an objectively hostile or abusive environment. Plaintiff states that whether the conduct complained of creates a hostile environment is a factual question for the jury to decide, citing Doe v. Claiborne County, Tennessee, 103 F. 3d 495, 515 (6th Cir. 1996). Therefore, Plaintiff argues, the only matter to be determined on the pending motion is whether there is a jury

question on the issue of employer liability.

Plaintiff is correct that, as a general matter, the ultimate issue of whether a hostile environment exists is for the trier of fact, and the statement in Doe is such a general statement. However, Doe did not hold that summary judgment on that issue may not be granted in an appropriate case. As stated, the court's function in deciding a motion for summary judgment is to determine whether there are genuine, disputed issues of material fact; i.e., whether a jury could reasonably find for the Plaintiff on the issue in questions. See Anderson, 477 U.S. at 251-52. Courts routinely decide whether there is sufficient disagreement over the facts to require a case to go to the jury.

Plaintiff also argues that the hostile environment issue should go to the jury because Defendants' EEO officer, Carol Hanlon, testified in her deposition that under the company's policy on sexual harassment, the conduct Plaintiff complains of would be considered sexual harassment.

However, the issue in this case is not whether Phillips' conduct violated company policy; the issue is whether Plaintiff was subjected to a hostile environment under the legal standards applicable to Title VII. Many companies, as preventative and cautionary measures, have very strict policies regarding what types of behavior constitutes sexual harassment. Thus, conduct which violates company policy may, or may not, also violate Title VII.

Under Title VII, an employer may not lawfully "discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . ." 42 U.S.C. § 2000e-2(a)(1). The "terms, conditions, and privileges of employment" may include requiring a person to work in a discriminatory hostile or abusive environment. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986). However, such harassment is actionable only "[w]hen the workplace is permeated with discriminatory intimidation,

ridicule, and insult" that is "sufficiently sever or pervasive to alter the conditions of the victim's employment and create an abusive working environment." 477 U.S. at 65 & 67 (internal brackets and quotation marks omitted).

In Harris v. Forklift Sys., Inc., 510 U.S. 17, 114 S. Ct. 367 (1993), the Supreme Court reaffirmed the holding of Meritor; explaining that the work environment must be both objectively hostile or abusive, i.e., one that a reasonable person would find hostile or abusive – and one that the victim subjectively perceives as abusive. 114 S. Ct. at 370. "This standard takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." Id. The Court stated that whether an environment is objectively hostile or abusive must be determined by looking at all the circumstances. Relevant factors "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive

utterance; and whether it unreasonably interferes with an employee's work performance." Id at 371.

In this case, Plaintiff complains of only three incidents that she considers sexual harassment, none of which can be considered "severe." Only the first of the incidents involved any touching that could be considered inappropriate. However, although Phillips' placing of the cigarette pack under Plaintiff's bra strap may have been inappropriate – even offensive and crude – it cannot be considered physically threatening or humiliating. Plaintiff admitted that Phillips pulled her bra strap out only far enough to fit in the cigarette case, which was about an inch and a half thick. Although Tammy Locklear, a co-worker who was present during the incident, told Plaintiff later that she had seen Plaintiff's "whole" breast at the time, Plaintiff admitted that her breast was exposed no more than it would have been had she merely leaned over.

The other two incidents complained of involved crude

sex-based comments that Phillips made to Plaintiff. However, there is no indication that either of these comments was anything more than a "mere offensive utterance." 114 S. Ct. at 371. As the Sixth Circuit recognized in Black v. Zaring Homes, Inc., 104 F. 3d 822 (6th Cir. 1997), "Title VII was 'not designed to purge the workplace of vulgarity.'" Id. at 826 (quoting Baskerville v. Culligan Int'l Co., 50 F. 3d 428, 430 (7th Cir. 1995)). Furthermore, the record contains no evidence showing that the incidents complained of, either alone or considering the totality of the circumstances, unreasonably interfered with Plaintiff's work performance.

Plaintiff has submitted the affidavit of another co-worker, Felicia Meadows, along with comments made by Tammy Locklear and an unknown employee that were put into a "suggestion box" at Grinnell after Plaintiff filed her EEOC charge. However, the "suggestions" express only the personal feelings of the writers. Likewise, Meadows' affidavit expresses only her own feelings about the situation,

and about how she believes Plaintiff has been affected by it. Neither Meadows nor Locklear is a plaintiff in this action, and evidence of their personal feelings and perceptions is insufficient to create a genuine issue of material fact regarding whether Plaintiff was subjected to an objectively hostile or abusive working environment.

Plaintiff has also submitted portions of her deposition testimony concerning an EEOC charge that she filed against Grinnell in the mid-1980's, alleging gender discrimination in her removal from a welding job. However, this testimony does not appear to be relevant to the issues in this case. Although Plaintiff testified that Phillips knew of that EEOC charge, there is no evidence that he was in any way involved in the alleged gender discrimination. Plaintiff testified that she had never discussed the charge with Phillips. Furthermore, an incident that occurred more than ten years ago could not support liability in this action.

The court concludes that Plaintiff has failed to show

that there are material facts in dispute regarding whether the conduct complained of was severe or pervasive enough to create a working environment that a reasonable person would find hostile or abusive. Therefore, it is unnecessary to address the standard required to establish employer liability.

Plaintiff has also failed to establish a genuine issue of material fact on her claim that she suffered retaliation for filing charges of harassment. In order to establish a prima facie claim of retaliation, Plaintiff must prove: 1) that she engaged in activity protected under Title VII; 2) that the employer knew of Plaintiff's exercise of her rights; 3) that the employer thereafter took an employment action adverse to Plaintiff; and 4) that there was a causal connection between the protected activity and the adverse employment action. Equal Employment Opportunity Comm'n v. Avery Dennison Corp., 104 F. 3d 858, 860 (6th Cir. 1997).

Plaintiff has failed to prove a prima facie case of retaliation, as she has offered no evidence that she was

subjected to an adverse employment action. Plaintiff testified merely that her bathroom breaks were timed by her supervisor for a while, and that when she attempted to talk with the plant manager about the problem, he would not meet with her or discuss the matter with her. This is not the type of adverse employment action that will support a retaliation claim. See e.g., Kocsis v. Multi-Care Management, Inc., 97 F. 3d 876, 885-887 (6th Cir. 1996) (employee's transfer to a different unit, with no reduction in pay or benefits, or material modification of duties, was not adverse employment action); Dollis v. Rubin, 77 F. 3d 777, 781-82 (5th Cir. 1995)("Title VII was designed to address ultimate employment decisions [such as hiring, granting leave, discharging, promoting, and compensating], not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions"); Harlston v. McDonnel Douglas Corp., 37 F. 3d 379, 382 (8th Cir. 1994) ("changes in . . . working conditions that cause no

materially significant disadvantage . . . are insufficient to establish the adverse condition required"); Crady v. Liberty Nat'l Bank and Trust Co., 993 F. 2d 132, 136 (7th Cir. 1993) (a change in employment conditions "must be more disruptive than a mere inconvenience or an alteration of job responsibilities").

For the foregoing reasons, the court concludes that Defendants are entitled to judgment as a matter of law on Plaintiff's Title VII claims of hostile environment and retaliation. Therefore, the motion for summary judgment is GRANTED.

On January 5, 1998, Plaintiff filed a motion seeking a stay of this case, which is currently scheduled for trial on January 26, 1998, to await the outcome of a case in which the United States Supreme Court recently granted certiorari, Faragher v. City of Boca Raton, 111 F. 3d 1530 (11th Cir. 1997), cert. granted, 118 S. Ct. 438 (Nov. 14, 1997). The issue in Faragher is the standard for determining employer

liability in cases where sexual harassment is committed by a supervisor. In the alternative, Plaintiff moves for voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(2), so that the case may possibly be refiled after Faragher is decided. Defendants' have responded that they are opposed to a stay to await the decision of the Supreme Court because the motion for summary judgment is addressed only secondarily to the issue of employer liability. Defendants state that if the court finds, as it has, that Plaintiff has failed to show an objectively hostile environment, "the case is ended." However, as pointed out in note 1, supra, Defendants' motion for summary judgment did not address Plaintiff's claim of quid pro quo sexual harassment; therefore, that claim still remains for disposition.

Defendants have also indicated that they would not object to the court allowing Plaintiff to dismiss the action without prejudice conditioned on the reservation of all available defenses if the case is refiled. However, even if

this cour were to allow Plaintiff to dismiss the action "without prejudice," it would, in effect, be with prejudice. The filing of a timely complaint that is later dismissed without prejudice does not toll the statutory ninety-day filing period of Title VII. As Plaintiff's original ninety-day filing period expired long ago, any attempt to refile would be untimely. See Wilson v. Grumman Ohio Corp., 815 F. 2d 26 (6th Cir. 1987). See also Garfield v. J. C. Nichols Real Estate, 57 F. 3d 662 (8th Cir.), cert. denied, 116 S. Ct. 380 (1995); Robbins v. Bentsen 41 F. 3d 1195, 1199-1200 (7th Cir. 1994); Brown v. Hartshorne Pub. Sch. Dist. #1, 926 F. 2d 959, 961 (10th Cir. 1991); Chico Velez v. Roche Products, Inc., 971 F. Supp. 56, 59-60 (D.P.R. 1997). Therefore, allowing a voluntary dismissal would not accomplish Plaintiff's goal.

The court concludes that although a formal stay of all activity in this case is neither necessary nor desirable, the interests of the parties and of judicial economy would be best

served by continuing the trial of the case for an indefinite period of time.

Plaintiff's motion to stay or for voluntary dismissal is DENIED. The trial of this action, currently scheduled for January 26, 1998, is hereby CONTINUED, indefinitely.

IT IS SO ORDERED.

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